IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PALMER COKING COAL COMPANY, a Washington partnership, WHITE RIVER FORESTS LLC, a Delaware limited liability company, and JOHN HANCOCK LIFE INSURANCE COMPANY, a Massachusetts life insurance company,	)	NO. 62993-0-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
Respondents,	)	
v.	)	
KING COUNTY, a municipal corporation of the State of Washington,	)	
Appellant.	)	FILED: August 23, 2010

Leach, A.C.J. — King County Code (KCC) 19A.08.070 sets forth the criteria that a property owner must satisfy to obtain legal lot recognition. Only a legally created lot may be sold or transferred.[1] In this case, we must interpret

[1] KCC 19A.08.170 provides,

> Any person or entity who violates this title or who sells or transfers a lot, tract or parcel that was not created consistent with this title or chapter 58.17 RCW or that has not been recognized by the department as a legal lot under this chapter shall, in addition to any remedies and sanctions provided for under state law, be subject to the enforcement provisions of K.C.C. Title 23.

two code provisions in former KCC 19A.08.070 (2004), subsections (A)(1)(a) and (A)(4)(d).[2] Palmer Coking Coal Company, White River Forests, LLC, and John Hancock Life Insurance Company (collectively "Applicants") sought legal recognition of lots located in the forest zoning district that were created by federal law before 1937, when there were no state or local subdivision laws in effect. The King County Department of Development and Environmental Services (DDES) denied the majority of the applications, and the superior court affirmed the denial. According to the court, subsection (A)(1)(a) controlled to the exclusion of subsection (A)(4)(d). Because subsection (A)(4)(d) applies by its plain language, we reverse and remand.[3]

FACTS

On October 10, 2007, Palmer Coking Coal Company (Palmer) applied to DDES for legal lot recognition of 98 parcels located in the forest zoning district of unincorporated King County. Then, on November 12, 2007, White River Forests, LLC, and FTGA Timberlands, LLC—subsidiaries of John Hancock Life Insurance Company (collectively "White River")—applied for recognition of 153 parcels that were also located in the forest zoning district. Consultant Stephen Graddon prepared the applications for both Palmer and White River. Graddon

[2] We note that KCC 19A.08.070 was recently amended in 2009. Because the legal lot recognition applications at issue were filed in 2007, our holding is limited to the analysis of the version of KCC 19A.08.070(A) adopted in 2004.

[3] Because resolution of this issue is dispositive, we do not address the remaining assignments of error related to the denial of the Applicants' recognition requests.

determined that all 251 parcels were

> historically created lots that were legally subdivided under the applicable subdivision rules in place at the time of their creation. In most instances, the lots were created prior to Washington statehood in 1889 under an evolution of federal laws. . . . These laws resulted in separate parcels or lots being created as quarter-quarter sections of land or 40-acre lots, known as the "Smallest Legal Subdivision" of a section under federal law. Over the years, while essentially maintaining their individual parcel identities and tax account numbers, these . . . properties have been acquired or sold either individually or in blocks.

For the majority of the proposed lots, the Applicants submitted evidence that the lots were recognized as tax parcels before 1937.

In processing the applications, DDES staff determined that the parcels were primarily accessed by roads with gravel surfacing. Because King County's legal lot recognition ordinance in effect at that time required pre-1937 parcels to be provided with "approved sewage disposal or water systems or roads," DDES staff sought an interpretation of the term "approved road."[4]

On February 22, 2008, after consulting with the DDES Regulatory Review Committee and other staff, DDES Director Stephanie Warden issued a final code interpretation (FCI). Based on the 1993 King County Road Standards, the FCI concluded that "'logging roads,' 'forest service roads' and other similar rudimentary access roads are not approved roads for purposes of K.C.C. 19A.08.070A1."

On April 4, 2008, DDES denied recognition to 75 of Palmer's parcels and

[4] Former KCC 19A.08.070 (2004).

115 of White River's parcels.[5] In the lot determination letters, DDES applied the following criteria to deny lot recognition:

> 1. Site is not served by an approved road pursuant to FCI.
> 2. A private gate prevents access to on-site logging/forest access roads.
> 3. No Right-of-Way (e.g., an easement) has been devoted to transportation purposes.
> 4. No approved roads accessing site. Site fronts on a "Managed Access" state highway . . . No proof of private access permit provided with request for legal lot status.[6]

The Applicants appealed the lot recognition decisions to King County Superior Court under the Land Use Petition Act, chapter 36.70C RCW (LUPA).[7] All of the appeals were consolidated.

By stipulation, the superior court resolved certain issues on cross motions for summary judgment. The court's order granted in part King County's motion for partial summary judgment, granted in part White River's motion for summary judgment, and denied Palmer's motion for summary judgment. The court determined that "DDES was not obligated to analyze the Petitioners' Applications pursuant to the alternative provisions in KCC 19A.08.070(A)(4)(d), and the DDES Decisions denying recognition of Petitioners' Lots [were] not an

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[5] The parties have cited different numbers in pleadings before the trial court and this court. The record is unclear as to the exact number of denied lots.

[6] The fourth criterion was applied only to White River's applications. In Palmer's applications, DDES explained that it had developed seven guidelines to evaluate the applications in a fair and consistent manner. These guidelines were listed under the heading "Standard Application of King County Code 19A.08."

[7] The code does not appear to make administrative appeals available for denials of legal lot recognition. See KCC 20.20.020(A)(1); KCC 2.100.050. The Applicants also appealed the FCI.

erroneous interpretation of this code provision."[8] The court certified the partial summary judgment for appeal under CR 54(b), and all parties appealed.

STANDARD OF REVIEW

The Applicants challenge DDES's denial of their lot recognition requests under LUPA. LUPA generally provides the exclusive means for judicial review of a land use decision.[9] Under LUPA, a "land use decision" is "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals," on "[a]n application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used."[10] Relief from a land use decision may be granted only if the petitioner establishes that one of six grounds listed in RCW 36.70C.130(1) has been satisfied.[11] The Applicants assert that two grounds apply to this case:

> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

[8] The court also ruled that the FCI was neither an erroneous interpretation of KCC 19A.08.070(A)(1)(a) nor a clearly erroneous application of that provision to the facts. At the same time, the court ruled that the FCI was not entitled to a deferential standard of review because it "was not consistent with past administrative practices, or the clear intent of the legislative body." Finally, the court held that Director Warden had exceeded her authority when she applied the FCI to the applications.

[9] RCW 36.70C.030; Twin Bridge Marine Park, LLC v. Dep't of Ecology, 162 Wn.2d 825, 854, 175 P.3d 1050 (2008).

[10] RCW 36.70C.020(2)(a); Citizens to Preserve Pioneer Park LLC v. City of Mercer Island, 106 Wn. App. 461, 470-71, 24 P.3d 1079 (2001).

[11] RCW 36.70C.130(1).

> (d) The land use decision is a clearly erroneous application of the law to the facts.[12]

Subsection (b) presents a question of law that this court reviews de novo.[13] Subsection (d) addresses application of the law to the facts, which we review under the clearly erroneous test.[14] When reviewing a land use decision, this court stands in the same position as the superior court, and our review is limited to the administrative record.[15]

Here, the trial court sustained the challenged decisions by summary judgment. Summary judgment is appropriate where there are no disputed material facts, and the moving party is entitled to judgment as a matter of law.[16] Under RCW 36.70C.140, this court "may affirm or reverse the land use decision under review or remand it for modifications or further proceedings."

ANALYSIS

Legal Lot Recognition

The Applicants argue that their properties should be recognized as legal lots without compliance with KCC 19A.08.070(A)(1)(a) because they satisfy KCC 19A.08.070(A)(4)(d). Statutory construction is a question of law reviewed de novo.[17] Courts interpret local ordinances the same as statutes.[18] An

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[12] RCW 36.70C.130(1).

[13] Peste v. Mason County, 133 Wn. App. 456, 466, 136 P.3d 140 (2006).

[14] Peste, 133 Wn. App. at 467.

[15] Nagle v. Snohomish County, 129 Wn. App. 703, 708-09, 119 P.3d 914 (2005).

[16] CR 56(c).

[17] Belleau Woods II, LLC v. City of Bellingham, 150 Wn. App. 228, 240, 208 P.3d 5 (2009).

unambiguous ordinance will be applied according to its plain meaning; only ambiguous ordinances will be construed.[19] The pertinent provisions of former KCC 19A.08.070(A) provide,

> A. A property owner may request that the department determine whether a lot was legally segregated. The property owner shall demonstrate to the satisfaction of the department that a lot was created, in compliance with applicable state and local land segregation statutes or codes in effect at the time the lot was created, including, but not limited to, demonstrating that the lot was created:
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> 1. Prior to June 9, 1937, and has been:
> a. provided with approved sewage disposal or water systems or roads; and
> b. (1) conveyed as an individually described parcel to separate, noncontiguous ownerships through a fee simple transfer or purchase prior to October 1, 1972; or
> (2) recognized prior to October 1, 1972, as a separate tax lot by the county assessor;
> 2. Through a review and approval process recognized by the county for the creation of four lots or less from June 9, 1937, to October 1, 1972, or the subdivision process on or after June 9, 1937;
> 3. Through the short subdivision process on or after October 1, 1972; or
> 4. Through the following alternative means allowed by the state statute or county code:
> . . . .
> d. at a size twenty acres or greater, recognized prior to January 1, 2000; provided however, for remnant lots not less than seventeen acres and no more than one per quarter section.

(Emphasis added.)

King County (the County) contends that subsection (A)(4)(d) does not apply because all lots created before 1937 must satisfy subsection (A)(1)(a) to

[18] Sleasman v. City of Lacey, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).
[19] Sleasman, 159 Wn.2d at 643.

qualify for legal lot recognition. But the words "including, but not limited to" contained in the prefatory language of KCC 19.08.070(A) indicate that subsection (A)(1)(a) does not exclusively govern legal lot recognition of pre-1937 lots. Rather, a property owner may obtain recognition of pre-1937 lots by alternatively satisfying the requirements of subsection (A)(4)(d). Additionally, the structure of former KCC 19A.08.070(A) is inconsistent with the County's proposed interpretation. Subsections 1 through 4 are listed disjunctively, suggesting that each of the four subsections is an alternative of equal stature.[20] Nothing in the ordinance states that, based on its date of creation, a property must be considered exclusively under one subsection.

Even if subsection (A)(4)(a) applies to pre-1937 lots, the County contends that the lots at issue were never "'created' by any alternate means allowed by state statute or code." According to the County, this language must be viewed in light of "the large lot exemption in former KCC Title 19. Title 19 contained an exemption from the requirements of its subdivision Code for parcels twenty acres or larger if they met the minimum lot size in their zones. But § 19A.08.010 contemplated that specific lots would be created." Specifically, the County cites to former KCC 19.08.010(B) (1995), which states,

> [T]he provisions of this title shall not apply to:
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> (B) Any division of land into lots or tracts each one of which is

[20] See Caven v. Caven, 136 Wn.2d 800, 807, 966 P.2d 1247 (1998) ("[T]he word 'or' . . . grammatically is a coordinating particle signifying an alternative.").

> twenty acres or larger, or in the case of zone classifications requiring a minimum lot area greater than twenty acres, each of which complies with the lot area requirements of that classification. Once the original parcel is subdivided into its maximum number of lots or tracts allowed under this section, no additional subdivision of these lots or tracts shall be done except through the subdivision or short subdivision process.

Emphasizing the underlined language, the County argues that "the language of Title 19 made clear the land owner was still required to subdivide its parcels into lots. There is no evidence in the record that any lots were ever created on LLD applicants' parcels pursuant to KCC § 19."

The Applicants respond that subsection (A)(4)(d) applies because the "40-acre parcels were created pursuant to the federal laws governing the segregation and subdivision of the public domain." They add that "[t]he government plats that created the 40-acre parcels have not, and cannot, be revoked by King County." In other words, no state or local law in effect at the time of the federal government's segregation and subdivision purported to prohibit or restrict the federal government's actions. Before addressing the merits of this argument, we briefly describe the federal survey of public lands according to The Manual of Surveying Instructions for the Survey of the Public Lands of the United States.[21]

[21] Bureau of Land Mgmt., U.S. Dep't of the Interior, The Manual of Surveying Instructions for the Survey of the Public Lands of the United States (2009). WAC 332-130-030(1) provides, in relevant part,

> [T]he subdividing of sections shall be done according to applicable . . . BLM [Bureau of Land Management] plats and field notes and in compliance with the rules as set forth in the appropriate . . . BLM Manual of Surveying Instructions, manual supplements and circulars. Federal or state court decisions that influence the

In 1785, Congress established the federal rectangular survey system for "surveying and thereby demarcating the public lands for their (1) orderly disposition into new States, (2) conveyance from Federal into State and private ownership, or (3) retention for Federal administration."[22] This system provided for "townships of 36 square miles comprised of sections of 1 square mile (640 acres, more or less), each subdivided into quarter sections (160 acres) and quarter-quarter sections (40 acres)."[23] Under the rectangular system, each tract of land received a unique identifying description.[24] Before the completion of a survey, the lands were known as "unsurveyed public lands" and could not be transferred out of federal ownership.[25] "[T]he unit of administration [was] the quarter-quarter section of 40 acres or the lot, either of which [was] referred to as the smallest legal subdivision."[26]

Washington was one of the thirty states originally surveyed under the federal rectangular system.[27] All land titles in Washington can be traced back to a federal land patent or grant.[28] These titles "contain a written land description

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> interpretation of the rules should be considered. Methods used for such . . . section subdivision shall be described on the survey map produced.

[22] Bureau of Land Mgmt. at 1.
[23] Bureau of Land Mgmt. at 1.
[24] Bureau of Land Mgmt. at 1.
[25] Bureau of Land Mgmt. at 1.
[26] Bureau of Land Mgmt. at 39.
[27] Bureau of Land Mgmt. at 15, 17.
[28] See Bureau of Land Mgmt. at 1; see also 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 13.2, at 73 (2d ed. 2004) ("Since all land titles in Washington originated in a federal patent or grant and since the land descriptions in such patents and grants must be

and locatable, on-the-ground monuments established according to an original 'cadastral survey,' which created (not merely located) identifiable land boundaries."[29] "[T]he boundaries and subdivision of the public lands as surveyed . . . are unchangeable after the passing of title by the United States."[30]

Our Supreme Court in Greenblum v. Gregory[31] recognized these principles in addressing whether county surveyors could change a government survey by observing, "'The phrase quoted ["legal subdivision"] applies only to the divisions of land which result from the application of the ordinary methods used in the making of government surveys, the smallest of these being the forty-acre square, or quarter-quarter section.'" Noting that the county surveyors mistakenly referred to government subdivisions of the land in issue as quarter sections and not as lots, the Greenblum court concluded, "No authority has been cited, nor are we able to find any, which permits the county officials to re-survey, re-plat, or change the legal subdivisions as established [by the federal government]; and while this is not the open contention of respondents, the effect of sustaining their position would be to recognize the establishment of new subdivisions different from the official plat."[32]

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based upon a government survey, the government surveys provide the original source of all Washington land descriptions.").

[29] Bureau of Land Mgmt. at 1.

[30] Bureau of Land Mgmt. at 13.

[31] 160 Wash. 42, 46-47, 294 P. 971(1930) (quoting Hopper v. Nation, 78 Kan. 198, 96 P. 77 (1908)).

[32] Greenblum, 160 Wash. at 48; see also 18 Stoebuck & Weaver, § 13.2, at 74 ("Ultimately, the force of the system of government surveys rests upon a rule of evidence law, recognized in Washington and everywhere else: courts

In light of the Manual of Surveying Instructions and Greenblum, the Applicants' reading of subsection (A)(4)(d) is persuasive.[33] The County's reliance on former KCC 19.08.010(B) to construe the unambiguous language in subsection (A)(4)(d) is misplaced.[34] Moreover, the County concedes that "[m]ost of the parcels proposed in the legal lot recognition at issue were approximately 40 acres, and were based on historic land survey quarter-quarter sections."

The County also contends that the lots were not "recognized prior to January 1, 2000." It urges the rejection of the Applicants' argument that (1) the lots were recognized when they were "created under federal law and transferred from the public domain into private hands" and (2) the lots were "recognized by King County through its County Assessor" as established by historic tax records. The County insists that "'recognized' . . . does not mean by the county assessor." Even if the county council intended this limited meaning, the court "cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission."[35] In its motion for partial

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take judicial notice of the system. Moreover, a point that has been located on the ground on a government survey is conclusive; no surveyor, no court may go behind it or show that it is in error.").

[33] The Applicants also point out that KCC 19.04.210 defines "lot" as "a physically separate and distinct parcel of property that has been created pursuant to the provisions of this title, or pursuant to any previous laws governing the subdivision, short subdivision or segregation of land."

[34] C.J.C. v. Corp. of Catholic Bishop of Yakima,138 Wn.2d 699, 708, 985 P.2d 262 (1999) ("Where the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone; we may not look beyond the language nor consider the legislative history.").

[35] Jenkins v. Bellingham Mun. Court, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981).

summary judgment, the County conceded that "for the vast majority of the proposed lots, the petitioner presented evidence that the lot [sic] was recognized as a 'tax parcel' prior to 1937. The existence of these pre-1937 tax parcels is not disputed." The lots were thus "recognized prior to January 1, 2000."

Finally, the County contends that the interpretation of subsection (A)(4)(d) advanced by the Applicants is inconsistent with the 80-acre minimum lot area requirement for the forest zone.[36] The County emphasizes that the Applicants' reading would require the recognition of any lot greater than 20 acres. This alleged inconsistency, however, does not compel a different result since it is the "result of the language that the legislature used and it is not for us to find a different effect of these statutes than that which the legislature expressed."[37] We further note that in the lot determination letters, DDES explained,

> Recognition of the property as a separate lot under K.C.C. 19A.08.070 is not to be regarded as a commitment of any sort by King County that the lots in their present state contain a building site; or that the lots may become building sites through the boundary line adjustment process; or are suitable for development under applicable King County ordinances. Any application for development approval will be reviewed under the ordinances and laws in effect at the time of application.

The County's argument thus mistakenly assumes that certain consequences, such as exceptions to zoning code requirements, will necessarily flow if the Applicants obtain legal lot recognition. Indeed, the Applicants acknowledged at

[36] KCC 21A.12.040.

[37] State v. Madrid, 145 Wn. App. 106, 116-17, 192 P.3d 909 (2008) (holding that while "result here may be anomalous . . . it is not absurd" and that "the disparity does not rise to the level of such absurdity that we should ignore the statute's plain meaning").

oral argument that obtaining legal lot status does not by itself entitle a property owner to any particular use of that lot.

We conclude that subsection (A)(4)(d) applies by its plain language. As DDES erroneously failed to apply subsection (A)(4)(d), its decision was clearly erroneous.

Attorney Fees

White River requests fees and costs under RCW 4.84.370, which provides for an award of fees and costs to the substantially prevailing party in an appeal of a land use decision by a county, city, or town, if that party also prevailed in all prior judicial proceedings.[38] White River did not substantially prevail below.[39] Accordingly, no fees are awardable.

CONCLUSION

We hold that, because subsection (A)(4)(d) applies by its plain language to the Applicants' properties, these properties need not satisfy the requirements of subsection (A)(1)(a) to qualify for legal lot recognition.

Reversed and remanded for proceedings consistent with this opinion.

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[38] RCW 4.84.370(1); Berst v. Snohomish County, 114 Wn. App. 245, 258, 57 P.3d 273 (2002). Palmer did not request fees in its briefing.

[39] See, e.g., Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 832, 965 P.2d 636 (1998) (Developers were not substantially prevailing party on appeal where one land use petition was found to have been properly dismissed but dismissal of the other petition was reversed).

Leach, A.C.J.

WE CONCUR: